UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KEN LAFFIN, DAVID WANTA and REBECCA BURGWIN, Individually and on Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	
v.	§	C.A. No.: 3:11-cv-00345-M
NATIONAL FOOTBALL LEAGUE, COWBOYS STADIUM, G.P., LLC, COWBOYS STADIUM, L.P., DALLAS COWBOYS FOOTBALL CLUB, LTD., AND JWJ CORPORATION,	§	
Defendants.	§	

PLAINTIFFS' MOTION TO REMAND AND BRIEF IN SUPPORT

Plaintiffs Ken Laffin, David Wanta, and Rebecca Burgwin ("Plaintiffs" or the "Laffin Plaintiffs") respectfully request that the Court remand this case to state court pursuant to 28 U.S.C. §§ 1447, 1453 because this Court lacks subject matter jurisdiction over this lawsuit.

SUMMARY OF MOTION

In their removal papers, Defendants National Football League and Cowboys Stadium, G.P., LLC, Cowboys Stadium, L.P., Dallas Cowboys Football Club, Ltd. and JWJ Corporation ("Defendants"), failed to prove by a preponderance of the evidence that the amount in controversy in Plaintiffs' case exceeds the Class Action Fairness Act ("CAFA") threshold of $5,000,000.[1] The Defendants offer no evidence of the amount in controversy in Plaintiffs' case,

[1] Defendants removed the case on the basis of the extended diversity jurisdiction provision under CAFA. To establish diversity jurisdiction in a class action, Defendants must demonstrate that: (1) minimal diversity of citizenship exists between the parties; (2) the proposed class has at least 100 members; (3) the amount in controversy exceeds $5,000,000, exclusive of interests and

and only make conclusory allegations. The Fifth Circuit, along with other Circuits, has expressly held that this does not meet the requirement of proving, by a preponderance of the evidence, that CAFA's jurisdictional requirements are met. *See* 28 USC § 1332(d); *Berniard v. Dow Chem. Co.*, No. 10-30497, slip op. at 7 (5th Cir. Aug. 6, 2010) (per curiam), attached as App. 1-12; *Bell v. Hershey Co.*, 557 F.3d 953, 958 (8th Cir. 2009) (remanding to the District Court with "instructions to apply the preponderance of the evidence standard to the jurisdictional facts."); *Lowdermilk v. U.S. Bank N.A.*, 479 F.3d 994, 998 (9th Cir. 2007) (finding that "when the plaintiff fails to plead a specific amount of damages, the defendant seeking removal must prove by a preponderance of the evidence that the amount in controversy requirement has been met." (internal citations omitted)). Defendants rely on pleadings by other plaintiffs in a separate lawsuit, even though the Fifth Circuit has recently held that allegations in another plaintiff's lawsuit constitutes no evidence at all. *See Berniard*, slip op. at 9 n.19 (stating that "[t]he mere recitation of jurisdictional facts [] is not enough to establish subject-matter jurisdiction") (internal citations omitted). As the Defendants failed to meet their burden of establishing a basis for federal jurisdiction, Plaintiffs request that the Court remand their case to the District Court of Dallas County, Texas.

FACTS AND PROCEDURAL HISTORY

Plaintiffs filed this action on February 9, 2011 in the District Court of Dallas County, Texas. Plaintiffs sought class action status and asserted Texas state law claims. *See* Plaintiffs Original and First Amended Class Action Petitions (Dkt. No. 1, Exhibits 2-3). Defendants

costs. 28 U.S.C. §§ 1332 (d)(2), (5)(b), (6). Defendants have not shown that amount in controversy exceeds $5,000,000 or that minimal diversity of citizenship exists.

removed the case to this Court on February 18, 2011, asserting diversity jurisdiction under 28 USC §§ 1332(d), 1453(b).

In their Original Petition and First Amended Petition, Plaintiffs did not plead a specific amount of damages. Defendants' removal petition attaches no evidence to support Defendants' claim that Plaintiffs' damages exceed $5,000,000 for the putative class.[2] *See* Defendants' Notice of Removal ¶6.

Defendants cite this Court to the Complaint filed in *Steve Simms et. al v. Jerral "Jerry" Wayne Jones*, Civil Action No. 11-CV-00248, pending in this Court to support their assertion that the Laffin Plaintiffs' claims exceed $5 million in controversy. Defendants ignore the differences between the claims and putative classes in the *Simms* case and the *Laffin* case. Specifically, the Simms plaintiffs assert three classes, including a "Founders" class, which comprises Cowboys' ticket holders who paid more than $100,000 per seat license and who seek massive damages. The Laffin Plaintiffs do not include these claims in their petition—either as a class or as a basis for damages.

[2] Defendants' allegations of the amount in controversy are as follows:

> Plaintiffs in this Lawsuit seek to represent a class of "all holders of tickets to the Super Bowl harmed by Defendants' actions," which Plaintiffs allege consists of more than 2,400 members. Plaintiffs assert claims for common law fraud, statutory fraud, breach of contract, fraudulent inducement, negligence and negligent misrepresentation. Plaintiffs seek on behalf of the putative class, actual, consequential and punitive damages, as well as attorney's fees. The claims of all individual class members are aggregated to determine the amount in controversy. 28 U.S.C. § 1332(d)(6). Therefore, the amount in controversy exceeds $5,000,000, exclusive of costs and interest.

Defendants' Notice of Removal ¶6.

ARGUMENT AND AUTHORITIES

I. Defendants bear the burden of proving a basis for federal jurisdiction under CAFA.

The removing defendant's burden to establish a basis for federal jurisdiction is beyond dispute in the Fifth Circuit. *Patterson v. Dean Morris LLP*, 448 F.3d 736, 739, n.2 (5th Cir. 2006); *see also, Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001); *Jernigan v. Ashland Oil, Inc.*, 989 F.2d 812, 815 (5th Cir. 1993); *Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991); *Gaitor v. Peninsular & Occidental S.S. Co.*, 287 F.2d 252, 253-54 (5th Cir. 1961).

The burden of establishing federal jurisdiction under CAFA falls on the removing defendant. *See, e.g., Preston v. Tenet Healthsystem Memorial Medical Center, Inc.*, 485 F.3d 793, 797 (5th Cir. 2007) (stating that the $5,000,000 amount in controversy is a "basic jurisdictional test" for cases removed under CAFA). District courts have applied these principles in class actions. *See, e.g., Cannon v. Dow Chem. Co.*, Cause No. 08-1397, 2008 WL 2308897, at*2 (E.D. La. June 2, 2008). The Fifth Circuit has recently reiterated this basic rule, stating "[t]he removing party's burden is to show not only what the stakes of the litigation *could be*, but also what they *are* given the plaintiff's actual demands. . . ." *Berniard*, slip op. at 8 (citing *Spivey v. Vertrue, Inc*., 528 F.3d. 982, 986 (7th Cir. 2008) (emphasis in original)).

To meet this evidentiary standard, the removing defendant must set forth "the ***facts*** in controversy" that support its basis for federal jurisdiction. *Grant v. Chevron Philips Chem. Co.*, 309 F.3d 864, 868 (5th Cir. 2002) (emphasis in original) (quoting *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir 1995)). "The preponderance burden forces the defendant to do more than point to a state law that might allow the plaintiff to recover more than what is pled. The defendant must produce evidence that establishes that the actual amount in controversy exceeds

[the jurisdictional amount]." *De Aguilar v. Boeing Company*, 47 F.3d 1404, 1423 (5th Cir. 1995). Further, "[r]emoval … cannot be based simply on conclusory allegations." *Allen*, 63 F.3d at 1335. Here, the Defendants make only conclusory allegations, cite to another lawsuit, and attach the Plaintiffs' pleadings.

II. Defendants' notice of removal does not include sufficient evidence to show that the amount in controversy exceeds $5 million.

The Defendants filed no affidavits with their Notice of Removal. Nor did Defendants set forth any specific facts about the amount in controversy in the Laffin Plaintiffs' claims. Defendants rely on two basic theories to support their amount in controversy allegations. First, Defendants rely on the fact that another plaintiff, in another lawsuit, has alleged more than $5 million in damages. Second, Defendants claim that there are potentially 2,400 members in the Laffin Plaintiffs' class and conclude that "the amount in controversy exceeds $5,000,000" because several state law claims are asserted. Defendants' Notice of Removal ¶6. On this record (and the dearth of evidence submitted by Defendants), jurisdiction is only proper if the amount in controversy is facially apparent from the Laffin Plaintiffs' petition. *See Berniard*, slip op. at 7; *Simon v. Wal-Mart Stores, Inc.*, 193 F.3d 848, 850 (5th Cir. 1999); *Spivey*, 528 F.3d at 986.

Other circuits apply this same standard. The removing defendant may not "make the plaintiff's claim for him," rather a plaintiff can be silent in his petition as to "one or more of the ingredients needed to calculate the amount in controversy." *Brill v. Countrywide Home Loans, Inc.* 427 F.3d 446, 449 (7th Cir. 2005). Therefore, if a petition is silent to the amount in controversy, as is the case here, the removing defendants "must provide a good faith estimate of the stakes that is plausible and supported by a preponderance of the evidence." *Hall v. Triad Financial Services*, No. 07-cv-0184, 2007 WL 2948405, at *1 (S.D. Ill. Oct. 10 2007) (quoting *Brill*, 427 F.3d at 449). Here, Defendants make no attempt to estimate the damages for the causes

of action brought by Plaintiffs in state court, let alone support any good faith estimate by a preponderance of the evidence. The Defendants merely paint the Laffin Plaintiffs with the same brush as the Simms Plaintiffs (even though the Simms Plaintiffs have putative classes with different characteristics and significantly higher claims based on the terms of the pleadings, including ticketholders who allegedly paid $100,000 a piece to have their choice of Super Bowl tickets). *Simms* First Amd. Compl. at ¶4.2. In fact, the Simms Plaintiffs assert that one of their classes paid more than $100 million in personal seat licenses, which raises the stakes for the Defendants. *Id.* The Laffin Plaintiffs do not include this putative "Founders Class" or damages based on these $100,000 seat licenses. Further, the *Simms* Complaint also includes causes of action that are not asserted by the Laffin Plaintiffs in their First Amended Petition, including a claim under the Texas Deceptive Trade Practices Act, which provides for treble damages.

To meet their burden of proving an amount in controversy in excess of $5 million, Defendants must support their contention with evidence, not mere assumption and speculation. *Berniard*, slip op. at 7; *Bartnikowski v. NVR, Inc.*, No. 07-cv-00768, 2008 WL 2512839, at *4 (M.D.N.C. June 19, 2008) (aff'd, 307 Fed. Appx. 730, 2009 WL 106378 (4th Cir. Jan. 16, 2009)); *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006) (rejecting estimate where defendant did not provide adequate rationale or evidence to support it); *Lowdermilk*, 479 F.3d at 1002 (rejecting defendants estimate as "speculation and conjecture" where defendant provided no evidentiary support for its assumption that all employees could be class members and that all class members would be entitled to maximum damages).

Defendants claim that since the *Simms* plaintiffs alleged that their case has damages in excess of $5 million, then the Laffin Plaintiffs must therefore claim damages and have the same amount in controversy. However, the courts (including the Fifth Circuit) have rejected identical

arguments even in situations where the complaints assert identical classes (unlike the situation before this Court). In *Berniard,* Defendants claimed that seven state court class actions could be removed because two putative class action cases were filed in federal court and claimed damages in excess of $5 million. The Fifth Circuit disagreed, holding that the "mere recitation of jurisdictional facts, however, is not enough to establish subject-matter jurisdiction." *Berniard,* slip op. at 9, n. 19 (citing *St. Paul Reinsurance Co., Ltd. v. Greenberg,* 134 F.3d 1250, 1253 (5th Cir. 1998)). As discussed above, the Laffin Plaintiffs' pleadings do not include the putative "Founders Class" found in the Simms Complaint. Moreover, the Simms plaintiffs claim that $100 million is in controversy due to the Founders Class. While Defendants may want to disregard the differences in the pleadings in these two cases, these differences exist and render Defendants' reliance on the Simms pleadings even more unsound.

III. Plaintiffs request an award of attorney's fees because Defendants failed to include evidence that provides an objectively reasonable basis for removal.

The record before this Court provides no objectively reasonable basis for removal. Plaintiff moves for an award of attorney's fees pursuant to 28 U.S.C. § 1447(c). An award of attorneys' fees is proper "where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 126 S. Ct. 704 (2005). No showing of bad faith or sanctionable conduct is required for an award of fees. *See Miranti v. Lee,* 3 F.3d 925, 929 (5th Cir. 1993). However, the Fifth Circuit law is clear. The Defendants bear the burden of showing facts, that when considered by the Court, are sufficient to establish by a preponderance of the evidence that this Court's jurisdiction is proper. The removal papers do not meet this standard. Instead, Defendants relied entirely on conclusory statements and claims by another Plaintiff, a tactic that has been expressly rejected by the Fifth Circuit (and other courts). Accordingly, Plaintiffs request an award of fees for their remand effort because

"[t]he jurisdictional issues involved in this case were neither complex, nor difficult, and Defendant had no objectively reasonable basis for removal." *Fiume Industries, Inc. v. American Exp. Travel Related Services Co., Inc.*, 2009 WL 4667542 at *5 (S.D. Tex. 2009) (citing *Admiral Ins. Co. v. Abshire*, 574 F.3d 267, 280 (5th Cir. 2009). The amount and nature of the attorney's fees requested are set forth in the affidavit of Charles W. Branham, III. (App. 13-15).

CONCLUSION AND PRAYER FOR RELIEF

The Laffin Plaintiffs have viable claims against the NFL and the Cowboys organization. Indeed the NFL and the Cowboys have publicly stepped up and accepted responsibility. They are even actively attempting to settle with individual putative class members and reduce the size of the putative class (and their litigation exposure). However, the mere fact that the Defendants have essentially conceded liability does not vest this Court with jurisdiction and create a federal case. The Defendants must do more to discharge their burden of proof. Otherwise, the scope of CAFA will be vastly expanded and years of federal jurisdictional jurisprudence will be turned on its head. Here, the basis for federal jurisdiction cobbled together by Defendants does not withstand scrutiny and falls short of the Fifth Circuit's requirements. This case was brought in state court, on the basis of state court claims, and there is no evidence before this Court to show that the amount in controversy exceeds the $5 million threshold. Accordingly, the Plaintiffs respectfully request that the Court remand this case, enter an award of attorney's fees associated with the remand motion in favor of Plaintiffs, and grant such other and further relief deemed just and proper.

Dated: February 23, 2011.

Respectfully Submitted,

/s/Charles W. Branham, III

Jeffrey Goldfarb
Texas Bar No. 00793820
Charles W. Branham, III
Texas Bar No. 24012323
Hamilton Lindley
Texas Bar No. 24044838
GOLDFARB BRANHAM LLP
Saint Ann Court
2501 N. Harwood, Ste. 1801
Dallas, TX 75201
(214) 583-2233 Telephone
(214) 583-2234 Facsimile
jgoldfarb@goldfarbbranham.com
tbranham@goldfarbbranham.com
hlindley@goldfarbbranham.com

ATTORNEYS FOR THE PLAINTIFFS

CERTIFICATE OF CONFERENCE

On February 23, 2011, pursuant to Local Rule 7.1 my office conferred with counsel for the Defendants. Each Defendant has indicated their opposition to this motion. Therefore it is submitted to the Court for decision.

/s/Charles W. Branham, III
Charles W. Branham, III

CERTIFICATE OF SERVICE

On February 23, 2011, I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court, Northern District of Texas, using the CM/ECF system which will send a notice of electronic filing to all counsel of record. I hereby certify that I have served all counsel of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/Charles W. Branham, III
Charles W. Branham, III